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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY DUANE SHORT,

Defendant and Appellant.

C065939

(Super. Ct. Nos.  
09F8955, 09F9520)

Defendant Gregory Duane Short pled guilty in 2010 to first degree burglary and receiving stolen property and admitted a prior strike conviction for a 1995 robbery, three prior prison commitment allegations and an on-bail enhancement. He was sentenced to 14 years four months in state prison.

On appeal, defendant contends the trial court abused its discretion by not dismissing his prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) or, alternatively, that the trial court failed to

make an informed exercise of its discretion by not considering alternative sentencing options.

We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1995 Prior Strike Conviction**

On February 6, 1995, a loss prevention officer at Shopko observed defendant take a video game, hide it in his pants, and leave the store without paying for it. The officer, along with another security guard, approached defendant outside of the store, displayed a badge and identified himself as store security. Defendant ran and both officers gave chase. After running approximately 75 yards, defendant suddenly stopped, turned, put his hand under his jacket and said, "I've got a gun." The pursuing officer who was closest to defendant had too much momentum to stop in response to defendant's threat. That officer tackled defendant and tried to subdue him. Defendant resisted, waving his arms around and kicking his feet at the officers. During the struggle, defendant deliberately kicked the second security guard in the face. Defendant was eventually handcuffed and the officers had to carry him back into the store by force.

Defendant was convicted of robbery (Pen. Code, § 211)<sup>1</sup> and placed on formal probation for three years. The following year, he violated his probation and was sentenced to prison.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

## **The Current Cases**

### **Victim Matthew Kluttz -- Case No. 09F9520**

In August 2009, Matthew Kluttz returned home from work to find his home had been burglarized. Among the items missing were a Glock 26 nine-millimeter handgun, some jewelry, a safe, an iPod and a laptop computer equipped with a Lo-Jack security system. Several days later, utilizing the Lo-Jack system, police were able to determine that defendant was using the computer at a residence in Redding, accessing the website "classmates.com" and making purchases from pornographic websites with his credit card. Two days later, police determined that Kevin Velasquez was using the stolen computer to access the Internet from his home in Redding. Investigators confronted Velasquez there and recovered the computer. Velasquez told them someone in his family had purchased the computer from an unknown female for \$100.

A search of the computer revealed pictures of defendant and Christina Miller. Kluttz's neighbor recognized the people in the pictures as individuals he had seen before and after the burglary. Arrest warrants were issued for defendant and Miller.

On September 24, 2009, after "stak[ing] out" a residence, sheriff's deputies arrested defendant and Miller during a traffic stop. Deputies searched the car and found a backpack containing a tool with a sanding stone attachment and an iPod with the serial number removed. Miller's purse contained an iPod similar to the one stolen from Kluttz. The serial number had been removed from that device as well.

Defendant was not initially forthcoming with information related to the burglary. At first he claimed he had borrowed the laptop from a friend. After 45 minutes to an hour of denial and after the sheriff's deputy interrogating defendant confronted him with the evidence against him, defendant eventually admitted he entered the Kluttz home and took the laptop computer and handgun while Miller waited outside. Defendant said he was under the influence of "dust off" (compressed air ordinarily used to clean electronic devices) and claimed he did not remember much about the incident as a result. He did, however, provide information leading to the eventual recovery of the stolen handgun.

**Victim Melanie Gomez -- Case No. 09F8955**

On November 29, 2009, Melanie Gomez returned home at 2:00 a.m. from an evening out at the Showboat Lounge to find that her home had been burglarized and her jewelry collection worth approximately \$10,000 stolen. Gomez suspected Bradley Wilkerson. The prior summer, Wilkerson and his girlfriend, who was the bartender at the Showboat Lounge, had shown up at Gomez's home uninvited, during which they both used the bathroom in the master bedroom. Gomez believed Wilkerson saw her jewelry on that occasion. Gomez told sheriff's deputies that Wilkerson had been at the Showboat Lounge the night of the burglary and was accompanied by defendant. She saw Wilkerson leave the lounge at 1:00 a.m., but defendant stayed. Gomez said she observed defendant watching her and texting on his cell phone after Wilkerson left.

On November 30, 2009, at approximately 3:45 a.m., officers conducted a traffic stop of a car driven by defendant. Wilkerson and Miller were passengers in the car. When officers searched defendant, they found a Taser and pepper spray. In the car, officers found a bag of jewelry, a crowbar, a pair of gloves, and a can of "dust off." Gomez identified defendant during an in-field showup. She also identified the jewelry recovered from defendant's car, which was only a fraction of the collection stolen from her home. Defendant denied any knowledge of the jewelry, but stated he had overheard Wilkerson on the phone telling someone he had taken some jewelry to the home of Megan Deffebach, Wilkerson's girlfriend, and hid it behind a water heater. Defendant, Wilkerson, and Miller were arrested. Defendant was out on bail from charges related to the Kluttz burglary at the time of this arrest.

### **The Charges<sup>2</sup>**

In connection with the Kluttz burglary, defendant was charged in case No. 09F9520 with first degree residential burglary (count 1 -- § 459), and receiving stolen property (count 2 -- § 496, subd. (a)). The complaint also alleged a 1995 strike allegation and a prior serious felony conviction allegation, both relating to a 1995 robbery conviction (§§ 1170.12, 667, subd. (a)(1)), and four prior prison term allegations (§ 667.5, subd. (b)).

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<sup>2</sup> The criminal complaints also contain charges against Wilkerson and Miller.

In connection with the Gomez burglary, defendant was charged in case No. 09F8955 with receiving stolen property (count 2 -- § 496, subd. (a)), use or possession of tear gas with a prior conviction (count 3 -- former § 12403.7, subd. (a)), possession of burglary tools (count 5 -- § 466), and possession of a stun gun by a felon convicted of an assault crime (count 7 -- former § 12651, subd. (a)). The complaint also alleged a strike allegation and a prior serious felony conviction allegation for the 1995 robbery conviction (§§ 1170.12, 667, subd. (a)(1)), three prior prison term allegations (§ 667.5, subd. (b)), and an on-bail allegation (§ 12022.1).<sup>3</sup>

#### **Defendant's Negotiated Plea**

In a negotiated plea agreement, defendant pled guilty to first degree burglary, as charged in count 1 in the case concerning the Kluttz burglary. (Case No. 09F9520.) He also admitted the prior strike conviction and three of the four prior prison term allegations. He also pled guilty to receiving

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<sup>3</sup> There are discrepancies in the charging of the prior prison term allegations. In the case involving the Gomez burglary, the complaint alleged that defendant had been committed to prison on April 14, 1995 for a violation of section 211 -- robbery; on October 1, 2001 for a violation of section 32 -- accessory to crime; and on June 25, 2006 for a violation of section 459 -- burglary. In the complaint regarding the Kluttz burglary, the latter prison prior was alleged to have occurred on June 25, 1996, not 2006. A fourth prior prison term allegation for a June 3, 1993 conviction of receiving stolen property (§ 496) was also charged in connection with the case involving the Kluttz burglary, but not charged in connection with the case involving the Gomez burglary.

stolen property, as charged in count 2 in the case related to the Gomez burglary (case No. 09F8955) and admitted the prior strike and on-bail allegations. Defendant's pleas and admissions were in exchange for dismissal of all of the remaining counts and allegations, as well as all of the charges in a third case, and a sentencing lid of 14 years four months.

At the time of the plea, the court explained to defendant the definition of a sentencing lid. The court told defendant, "What the lid means is you can be sentenced to no more than that amount of time, and it's possible you can be sentenced to something less than that." The court informed defendant that his maximum exposure absent the agreement was 27 years eight months. The parties did not dispute that calculation.

#### **The Romero Motion**

Subsequent to his plea, defendant filed a *Romero* motion, inviting the court to exercise its discretion to strike his prior strike conviction. He also submitted a letter he authored to the court for consideration. A letter of acceptance from Teen Challenge, a residential drug treatment program, and a letter from defendant's ex-wife were also provided to the court. Defendant also provided a copy of the police report describing the circumstances of the offense underlying his 1995 strike conviction. The prosecutor filed a detailed opposition to the motion.

Following a hearing, which included testimony from several defense witnesses and extensive argument by counsel, the court

denied the *Romero* motion and sentenced defendant to a term of 14 years four months in state prison.

Defendant filed a timely notice of appeal but did not request a certificate of probable cause.

## **DISCUSSION**

### **I. Applicable Law**

Section 1385 gives the trial court authority, on its own motion or upon application of the prosecution, "and in furtherance of justice," to order an action dismissed. (§ 1385, subd. (a).) In *Romero*, the California Supreme Court held a trial court may utilize section 1385 to strike or vacate a prior strike for purposes of sentencing under the "Three Strikes" law, "subject, however, to strict compliance with the provisions of section 1385 and to review for abuse of discretion." (*Romero*, *supra*, 13 Cal.4th at p. 504.) Likewise, a trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a



“decision will not be reversed merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’” [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Carmony, supra*, 33 Cal.4th at pp. 376-377.)

“[T]he Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.”” (*Carmony, supra*, 33 Cal.4th at p. 377.) The circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the Three Strikes scheme must be extraordinary. (*Carmony, supra*, 33 Cal.4th at p. 378.)

In deciding whether it is in the interest of justice to strike strike allegations, the trial court “must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be

treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

## **II. Consideration of Factors**

Defendant contends the trial court abused its discretion under *Romero* and section 1385 by failing to consider all of the relevant sentencing factors including, among other things, the lack of violence in his background, the nature of the strike conviction, the remoteness of the 1995 prior strike, defendant's age, the fact that he accepted responsibility early on and assisted police in finding the stolen handgun, his remorse, his long-term addiction to drugs, his employability, the murder he witnessed at age 13, and the unexpected death of his father, and the part those events played in fueling his drug addiction, the impact of his drug addiction on his memory at the time of the crimes, his inability to participate in treatment due to his drug addiction, his ability to be a good father, and the impact years of incarceration would have on his son, the absence of a finding of eligibility "for drug rehabilitation through the criminal justice system," and the fact that he "had never been afforded treatment." We find no abuse of discretion.

The *Romero* hearing commenced with the court's acknowledgment that it had read the motion, the supplemental memorandum and the letters filed on behalf of defendant, and the opposition filed by the prosecutor. The court then heard testimony from four witnesses for defendant: defendant's ex-wife, Gina Short, who testified as to defendant's good character

and transformation and his ability to be a good father; Sacramento Valley Teen Challenge outreach supervisor Kelly Brabo, who testified that defendant was a "good applicant" for, and was "very serious" about participating in, the Teen Challenge residential drug treatment program; Sheriff's Deputy Brian Jackson, who testified that defendant expressed remorse and, although initially untruthful, was eventually honest during interviews; and defendant's mother, Noreen Short, who testified as to defendant's character and transformation, his ability to be a good father, and the fact that he was traumatized after he witnessed a "murder by [sic] hire" in the front yard of the family home as a young teenager.

The court also heard the victim impact statement of Melanie Gomez, who personally appeared and described the negative and lasting impact the burglary of her home has had on her. We will describe that statement in more detail *post*.

Defendant submitted a letter to the court in which he stated that drugs had wrecked his life and he claimed to have never had a chance at rehabilitation. He requested that the strike allegation be stricken so he could have a chance at being sentenced to the California Rehabilitation Center. He also stated, "I have done my best to give back to the people I stole from," but he did not describe any such efforts. Additionally, at the *Romero* hearing, defendant read aloud a letter he wrote to Gomez apologizing for his crimes.

The court heard argument from defendant's counsel, who contended there was a lack of violence or injury in defendant's

prior strike offense. Counsel characterized the prior strike as a "petty theft" aggravated only by the events that took place after defendant left the store. Counsel discussed the correlation between defendant's "substance abuse issues" and witnessing a murder on the front lawn of his home at age 13 and not receiving counseling. Counsel argued that, because the 1995 offense was charged as a strike, "[t]here was no probation. There was [sic] no programs. There was no rehabilitation[.]" Defendant was sent "straight to prison," and thereafter used drugs to deal with trauma and mask his feelings. Defense counsel also argued that, for a period of time, defendant got "clean," married his wife, raised his son, and worked as a bridge builder, until the unexpected death of his father and the eventual demise of his marriage caused him to return to drugs. Defendant's addiction to drugs and huffing continued and resulted in one of the current offenses, where "he wakes up out of a stupor having been huffing this Dust-Off, . . . and he's on the floor of a garage, and he's just committed a burglary that brings him here basically today." Counsel urged the court to sentence defendant to probation, a year in jail, and 18 months in the Teen Challenge program. As an alternative, if the court was disinclined to grant probation, counsel asked the court to sentence defendant to a shorter prison term than the lid of 14 years four months so defendant could "get back to that rehabilitation sooner rather than later."

Defendant infers that the court did not consider each of the factors he considers mitigating because the court did not

comment on those factors in declining to strike the strike allegation. All of the factors defendant cites were before the court at the *Romero* hearing. The fact that the court did not comment on each of the factors raised by defendant is of no moment, as there is no requirement that the court do so. (*In re Large* (2007) 41 Cal.4th 538 (*Large*); *Carmony, supra*, 33 Cal.4th at p. 376.) We presume that the trial court considered the evidence before it and correctly applied the law in rendering its decision not to strike the prior strike. (*Carmony, supra*, 33 Cal.4th at p. 378.) "While a court must explain its reasons for striking a prior [citations], no similar requirement applies when a court declines to strike a prior" [citation]. 'The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.'

[Citation.] 'Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.'" (*Large, supra*, 41 Cal.4th at p. 550, citing *Carmony, supra*, 33 Cal.4th at p. 376.) The burden is on defendant to rebut this "'strong presumption,'" (*Large, supra*, 41 Cal.4th at p. 551; accord, *Carmony, supra*, 33 Cal.4th at p. 378) and defendant here has not done so. Defendant simply reargues the points presented to the

trial court -- points the trial court heard, and is presumed to have considered.

We shall discuss the factors presented to the trial court in the context of the analysis our high court has set forth in *Williams*.

**A. Nature and Circumstances of the Present Convictions**

While defendant's newest felony convictions do not involve violence, they were, nevertheless quite serious. Indeed, one of the current convictions, residential burglary, is classified as a serious felony offense. (§ 1192.7, subd. (c)(18).) Moreover, defendant stole a firearm during that burglary. The other conviction, receiving stolen property, was related to a second residential burglary. Defendant agreed to the facts presented in the offense report. Ms. Gomez's statement showed that defendant was involved as a lookout in the commission of that offense. Jewelry valued at more than \$10,000 was taken from Gomez and defendant was found to be in possession of some of that jewelry. Defendant admitted to the probation department that he knew Wilkerson was going to burglarize Gomez's home. While he denied knowledge of the jewelry found in his car when interrogated by the police, he admitted knowing the jewelry was stolen and stated that he was trying to fence it through a friend at a local business that would buy the jewelry without requesting documentation.

Gomez told the probation department that the burglary was "the most violating and incredible thing that has happened to me. . . . They followed me and watched me . . . ." She feared

entering her own home for over a month after the burglary because she was afraid the perpetrators would return to her house. When Gomez appeared at the *Romero* hearing, she told the court that much of the jewelry had not been recovered. Some of the jewelry that was taken had been passed down from her great-grandmother. Several rings had belonged to her deceased mother. Much of the other jewelry cannot be replaced. Gomez told the court that her life will never be the same. She continues to think what might have happened had she come home while the burglar was still there.

#### **B. Nature and Circumstances of the Strike Conviction**

The trial court noted that the circumstances of defendant's 1995 strike conviction were "significant" -- "more significant than what [defense counsel] has put forward in good advocacy." Defendant takes issue with the court's characterization, noting that the offense "began as a petty theft [and] escalated into a robbery." The trial court was well aware of the facts related to defendant's prior strike. Having stolen a video game, defendant was approached in the parking lot of the store by security officers, one of whom displayed a badge and identified himself. Defendant ran, then turned and threatened that he had a gun. As the trial court noted, "[t]he prior felony is not an aggravated petty theft[, t]he prior felony is a robbery," during which defendant "not only threatened to use a gun, . . . he threatened to use a gun on store security, and he kicked the security [officer] in the face." Given those facts, we agree

with the court's characterization of the prior strike as "significant."

### **C. Defendant's Background, Character, and Prospects**

Defendant's criminal history dates back to 1992. The record shows that defendant sustained six felony convictions before the two felony convictions in the present cases.<sup>4</sup> He

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<sup>4</sup> Defendant has the following convictions and probation and parole violations:

1992 - Felony conviction for possession of an assault weapon. (former § 12280, subd. (b).) Defendant was placed on probation for three years and ordered to serve 120 days in jail. Defendant's probation was violated as the result of the following conviction.

1993 - Two felony convictions for receiving stolen property. (§ 496, subd. (a).) Defendant was sentenced to two years in state prison.

1995 - Felony conviction for robbery. (§ 211.) Defendant was initially placed on probation, but later violated his probation apparently as a result of the following conviction and was sentenced to two years in state prison.

1996 - Felony conviction for burglary. (§ 459.) Defendant was sentenced to four years in state prison for this offense.

2000 - Parole violation.

2001 - Felony conviction for accessory to a crime. (§ 32.) Defendant was sentenced to 32 months in state prison. Defendant's parole from the prior offense was violated.

2004 - Misdemeanor convictions for prowling (§ 647, subd. (h)) and appropriation of lost property (§ 485). Defendant was placed on probation for three years and ordered to serve 30 days in jail. His parole was again violated.

2005 - Parole violation.

2006 - Parole violation.



has been sentenced to prison four times, twice after first being placed on probation. He has five parole violations and two probation violations. It appears that defendant has either been in custody or on parole or probation since 1992. Defendant was on informal probation at the time he committed the current offenses, and he committed one of the current offenses while he was released on bail from the other. This pattern strongly suggests an inability to abide by the rules of society and the rules of supervision under a grant of probation.

Defendant argues that the trial court failed to acknowledge that other than the 1995 strike conviction, there is "a complete absence of violence" in defendant's history. From this, he infers that the trial court did not consider this factor. As we have already noted, the court is not required to comment on every fact and issue before it. Having been presented with evidence as to each of the points raised by defendant, we presume the trial court considered all of the evidence and correctly applied the law. (*Large, supra*, 41 Cal.4th at p. 550; *Carmony, supra*, 33 Cal.4th at p. 378.)

Moreover, the lack of violence is less significant than it might otherwise have been given defendant's history of possessing weapons. Defendant's first felony conviction was a 1992 conviction for possession of an assault weapon. At the

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2008 - Misdemeanor conviction for being under the influence of a controlled substance. (Health & Saf. Code, § 11550.) Defendant was placed on probation for three years and ordered to serve 90 days in jail.

time of his second arrest in the present case, defendant was found in possession of a Taser.

In any event, the test is not simply whether defendant's past and current crimes involved violence, but whether defendant's criminal history, taken as a whole and in conjunction with defendant's background, character and prospects, painted a picture of an individual who should be "deemed outside the scheme's spirit, in whole or in part." (*Williams, supra*, 17 Cal.4th at p. 161.) The trial court determined it did not. Given the totality of defendant's history, we cannot find that the court's determination was unreasonable.

Defendant contends that the court did not acknowledge the 14-year time lapse between the strike conviction and the current offenses. The remoteness of the strike conviction carries no significance here since defendant has not led a crime-free life for any significant period since the strike conviction. (See *People v. Gaston* (1999) 74 Cal.App.4th 310, 321 (*Gaston*).) And the trial court specifically recognized this circumstance, noting that "it doesn't appear that there was any period of more than a year where you remained free of . . . prison and custody since your initial state prison sentence back in 1996." While this observation may not have been 100 percent accurate, as we have noted, defendant has apparently been in custody, on parole, or on probation continuously since 1992.

Defendant points out that the trial court did not discuss what he characterizes as a decrease in the seriousness of his

criminal conduct since his most recent felony conviction in 2001. Defendant's argument implies that his character was changing for the better since he more recently committed only misdemeanor offenses. If defendant's convictions in the present case were minor felony offenses, defendant's argument might carry more weight. While it may be true that defendant committed less serious crimes during the period between his release on parole from the 32-month prison sentence he received in 2001 and the current offenses, that circumstance does not minimize the seriousness of the residential burglary for which he was convicted and his participation in a second residential burglary involving a substantial loss and for which he was convicted of receiving stolen property.

Defendant contends that the court failed to take into account his age and "did not determine how long [defendant] should be kept as a public charge." We see nothing mitigating about defendant's age. Defendant was 37 years old at the time of sentencing. He is neither young nor old. Defendant is middle-aged and he will still be middle-aged when he is released from state prison. Moreover, contrary to defendant's assertion, the court did determine how long defendant should be kept in the public charge -- 14 years four months.

Defendant contends that the trial court did not mention the murder that occurred in front of his house when he was in his early teens and the role that event played as a "catalyst" for his drug use. Actually, the court did. In its ruling, the court stated, "I understand that you've gone through some pretty

significant things in your life," but went on to note that defendant had only just recently sought treatment.

Defendant's counsel asserts that "[t]he most glaring omission from the trial court's comments is the fact that [defendant] had never been offered or been found eligible for drug rehabilitation through the criminal justice system." The record demonstrates that the trial court simply did not believe this assertion. The court noted that defendant had been given numerous opportunities on probation and, by virtue of that, had access to rehabilitative services, but had squandered those opportunities. Indeed, he told the probation department that he had thought about seeking treatment in the past, but offered the excuse that he could not stop using long enough to research programs.

While the trial court acknowledged that Teen Challenge is a good program, the court found that defendant's prospect for succeeding in drug treatment programming was "rather speculative." Defendant asserts that he "strongly disagrees" with the court's assessment. "[A] decision will not be reversed merely because reasonable people might disagree." (Carmony, *supra*, 33 Cal.4th at p. 377, quoting *People v. Preyer* (1985) 164 Cal.App.3d 568, 573.) Moreover, in light of defendant's prior history, we cannot fault the trial court for being skeptical that defendant would follow through. That history included loss of "all of his jobs" and the destruction of his marriage because of his drug use. Only now, when

defendant faces a substantial prison sentence, has he made addressing his addiction a priority.

Defendant has identified some mitigating factors. He was eventually cooperative and did provide information leading to the recovery of the gun stolen in the Kluttz burglary. But we also note that it took nearly an hour of interrogation before defendant became cooperative and told the truth to the deputy sheriff investigating that case. As for the Gomez burglary, even though defendant knew the "fence," it does not appear he helped secure the return of Gomez's irreplaceable heirlooms and other valuable jewelry.

Defendant is employable. He obtained his GED in 1991, three to four years before his 1995 robbery conviction. He obtained a journeyman welder certificate from Iron Workers Local 118 in 1996, but apparently this positive step forward did not mean he had stopped his criminal activity. That same year, he was convicted of his fifth felony, a burglary conviction. As we have noted, although defendant was able to obtain jobs as a welder, he lost those jobs because of his substance abuse. And through all of this, defendant never sought treatment on his own, nor did he take advantage of the programs available in the justice system either locally or in state prison.

Defendant is critical of the treatment programming offered in the California Department of Corrections and Rehabilitation (CDCR). He argues "[t]here is clearly a significant difference" between the treatment programming in the overcrowded CDCR and a full-time residential program. This argument might resonate had

defendant at least tried whatever programs were available to him in the CDCR or locally, and then relapsed. Relapse is not unusual, and might even be somewhat expected. But defendant did not even try. (See *Gaston*, *supra*, 74 Cal.App.4th at p. 322 [“Although ‘drug use appears to be an underlying factor in (appellant’s) criminal behavior, and in fact may be the root cause thereof,’ the record is barren of any attempts by Gaston to ‘root out’ such destructive drug dependency. Accordingly, his drug dependency does not fall into the category of mitigating circumstances].”)

Defendant was remorseful and the court found defendant’s expression of remorse to be sincere. Although sympathetic to the pleas of those who testified on behalf of defendant, and to defendant’s young son, the court found defendant fell within the spirit of the Three Strikes law.

Defendant has not established that the trial court’s decision was so irrational or arbitrary that no reasonable person could agree with it. (*Carmony*, *supra*, 33 Cal.4th at p. 377.) Indeed, in light of the oral and documentary evidence and argument presented, we conclude that the trial court’s decision was reasonable. Defendant falls squarely within the spirit of the Three Strikes law. The trial court did not abuse its discretion. The *Romero* motion was appropriately denied.

Finally, we note that defendant was presumptively ineligible for probation even if the strike allegation were stricken. (§§ 1203, subd. (e)(4), 462, subd. (a).) Defendant’s participation in the Teen Challenge program was thus predicated

on overcoming that presumption. To overcome the presumption requires a finding by the court that defendant's case is an unusual case and a grant of probation is in the interests of justice. (§§ 1203, subd. (e), 462.) The trial court appropriately found that this is not an unusual case. Defendant has overlooked this impediment to probation in his appellate briefing, and makes no attempt to show how this case fits any of the criteria for determining whether a case is an unusual case as set forth in rule 4.413 of the California Rules of Court.<sup>5</sup>

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<sup>5</sup> Rule 4.413 provides in pertinent part:

"(b) Probation in unusual cases

"If the defendant comes under a statutory provision prohibiting probation 'except in unusual cases where the interests of justice would best be served,' or a substantially equivalent provision, the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation.

"(c) Facts showing unusual case

"The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

"(1) *Facts relating to basis for limitation on probation*

"A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

"(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

### III. Consideration of Alternative State Prison Sentences

Defendant contends the trial court failed to "make an informed exercise of discretion" because it "apparently did not realize or at least consider that [defendant] could be sentenced as a second strike offender and still receive a sentence shorter than the one imposed." As defendant points out, our high court has held that a trial court "may exercise its discretion under section 1385, subdivision (a), so as to dismiss a prior conviction allegation with respect to one count, but not with respect to another." (*People v. Garcia* (1999) 20 Cal.4th 490, 503-504 (*Garcia*).) Defendant implies that since the court did not mention this authority, it must have been ignorant of it.

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"(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

*"(2) Facts limiting defendant's culpability*

"A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

"(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

"(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation;  
*and*

"(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses. (*Italics added.*)



While it is true that a trial court's exercise of its sentencing discretion must be well informed (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 981), there is no evidence here that the court failed to realize or consider this or any other alternative sentencing options.

As we have noted, when defendant entered his plea, the court explained to defendant that a sentencing lid meant that he could receive no more than 14 years four months, but that it was possible he could be sentenced to something less than that. In defendant's supplemental memorandum of points and authorities, which the court indicated it had read, defendant cited *Garcia*; counsel again referenced *Garcia* at the *Romero* hearing. Defendant cites nothing in the record that suggests the court had not read *Garcia*.

The court, after listening to the evidence and argument by counsel (including possible sentencing options), stated that it was mindful of its discretion under section 1385, and the conditions under which it could exercise that discretion, and explained the reasons for its denial of defendant's motion. Before doing so, the court stated it had "in mind those case authorities giving the Court discretion under [section] 1385 . . . to dismiss priors in the interest of justice." The trial court concluded its remarks, saying "in a rational view of all the circumstances here, . . . the *upper side* of the negotiated lid does appear to be appropriate in this circumstance." (*Italics added.*) The court's reference to the "upper side" of

the lid suggests it knew it could sentence defendant to some lesser state prison sentence than it imposed.

Moreover, as we have already noted, unlike a decision to strike a prior felony conviction, which requires that the court set forth its reasons for doing so (§ 1385, subd. (a)), a trial court is under no compulsion to articulate its entire thought process when a request to dismiss is denied. It is sufficient that the record, including the court's ruling, demonstrates a proper, informed exercise of discretion. It does so here.

Finally, defendant mentions in passing that the sentence of 14 years four months is "excessive" and "violates the constitutional guarantee of fundamental fairness set forth in the due process clause of the Fourteenth Amendment." This contention has been forfeited by defendant's failure to raise it in the trial court. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) The claim has also been forfeited by defendant's failure to support it with reasoned analysis or citations to legal authority in his briefing on appeal. (Cal. Rules of Court, rule 8.204(a)(1)(B); *People v. Windham* (2006) 145 Cal.App.4th 881, 893, fn. 8.)

Furthermore, defendant entered into a negotiated agreement that included a lid of 14 years four months in state prison. In the absence of such agreement, defendant faced a maximum sentence of 27 years eight months. In *People v. Shelton* (2006) 37 Cal.4th 759, our Supreme Court concluded that "inclusion of a sentencing lid implies a mutual understanding and agreement that the trial court has authority to impose the specified maximum

sentence and preserves only the defendant's right to urge that the trial court should or must exercise its discretion in favor of a shorter term. Accordingly, a challenge to the trial court's authority to impose the lid sentence is a challenge to the validity of the plea requiring a certificate of probable cause." (*Shelton, supra*, at p. 763.) Because defendant failed to request a certificate of probable cause, we need not consider his claim.

**DISPOSITION**

The judgment is affirmed.

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MURRAY, J.

We concur:

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NICHOLSON, Acting P. J.

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BUTZ, J.